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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and STATE OF IDAHO Plaintiffs, vs. ASARCO INCORPORATED; COEUR D'ALENE MINES CORPORATION; CALLAHAN MINING COMPANY; SUNSHINE PRECIOUS METALS; SUNSHINE MINING COMPANY, Defendants.	)	Case No. CV94-206-N-EJL **ORDER**

Pending before the Court in the above-entitled matter is Defendant Hecla and Asarco's Motions to Modify Consent Decree (Docket Nos. 55 and 56). The Court heard oral argument on the motion on August 22, 2001. The Court then scheduled a limited evidentiary hearing regarding the EPA's position on cleanup of the Coeur d'Alene Basin. Having now fully considered the testimony,

the exhibits admitted into evidence and the briefs and arguments of counsel the Court is prepared to rule on the motions.

Defendants Hecla and Asarco seek to have the Court modify the 1994 Consent Decree concerning the Bunker Hill Superfund Site (the "Box") based on three factors which they contend make compliance with the Consent Decree substantially more onerous than originally anticipated. First, the Defendants claim the settlement agreement between the United States and Sunshine Defendants in civil case USA v. Asarco, et al., 96-122-N-EJL, releasing Sunshine Defendants from further liability under the 1994 Consent Decree justifies modification. The Court orally ruled this factor was not a basis for modification of the Consent Decree. When the Consent Decree was entered it was certainly foreseeable that certain of the settling defendants could end up filing for bankruptcy and that the remaining, solvent defendants would still have responsibility under the Consent Decree for completing the work. Moreover, the Consent Decree is not substantially more onerous on Hecla and Asarco as the Sunshine Defendants were not paying a significant portion of the actual costs incurred. Finally, to allow modification to Hecla and Asarco's obligations based on the settlement of the Sunshine Defendants would be against the public interest as it would give unjust enrichment to Defendants who have not to settled the related natural resources damages action.

Second, Defendants claim the EPA and the state of Idaho's work plans under the Consent Decree have made the amount and cost of remedial work substantially greater than the Defendants expected. Again, the Court orally ruled this factor was insufficient to justify a modification of the Consent Decree. The Defendants admit that the estimated costs at the time the Consent Decree was entered were simply that, "estimated" costs. While it is true the actual work completed has cost millions more than "estimated" the Defendants knew there was a risk of actual costs exceeding

estimated costs and that they would still be liable for the actual costs. The Plaintiffs have also paid more than they estimated for the work in the non-populated areas of the Box. Additionally, the Consent Decree provides an administrative process for the Defendants to object to work plans they believe exceed the scope of the Consent Decree. This administrative process has previously been used by the Defendants to reduce their costs on certain Consent Decree work.

Third, the Defendants claim the EPA's change in position on how it would approach clean up in the Basin (versus the Box) justifies a modification of the consent decree. This is the issue the Court held an evidentiary hearing on to shed light on the following issues: 1) whether or not there is an ambiguity in the Consent Decree regarding the EPA's alleged commitment on clean up of the Basin and 2) even if the EPA's alleged commitment was not a term of the Consent Decree, does the Court by reason of its continuing jurisdiction over the Consent Decree and the provision of Fed. R. Civ. P. 60(b)(5) have authority to modify a decree on such terms as are just.

Rule 60(b), provides in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or other wise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . .

In Rufo v. Inmates of Suffolk County, 502 U.S. 367 (1992), the Supreme Court held the party seeking modification of consent decree bears the burden of establishing that a significant change in circumstances warrants revision of decree. The Ninth Circuit has held "the Rufo standard applies to all Rule 60(b)(5) petitions brought on equitable grounds." Bellevue Manor Associates v. United States, 165 F.3d 1249, 1257 (9th Cir. 1999).

The district court should exercise flexibility in considering a request for modification, however, a modification will not be warranted in all circumstances. Rufo at 383. Modification may be warranted based on a significant change in factual conditions or in law. Id. at 384. Specifically, the Court recognized three situations that could warrant revision of a decree: 1) "when changed factual conditions make compliance with the decree substantially more onerous;" 2) "when a decree proves to be unworkable because of unforeseen obstacles;" or 3) "when enforcement of the decree without modification would be detrimental to the public interest." Id. at 384. "[H]owever, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." Id. at 385.

It is the issue of "anticipation" that the parties hotly dispute. Plaintiffs maintain the EPA's authority and right to apply CERCLA remedial authority to the Basin could and should have been anticipated by Defendants. Defendants argue, based on the repeated representations of the EPA prior to and during decree negotiations, Defendants could not have reasonably anticipated EPA would seek to "superfund" the entire Basin.

Based on the evidence received, the Court makes the following findings:

The Court does not find there is any ambiguity in the Consent Decree. The Court finds the decree clearly sets forth the agreements of the parties as it relates to the Bunker Hill Superfund Site. As stated in a previous order, both sides of a contract of this nature are presumed to know the relevant CERCLA law when they entered into the Consent Decree, so the Court finds it was understood by the parties that the EPA had the "authority" to apply remedial CERCLA authority outside the Box and hold the potentially responsible parties ("PRPs") liable for alleged injury outside the Box. There is no legally binding commitment either in the Consent Decree or in the related Records of Decision that would prohibit the EPA from using full CERCLA remedial authority

outside the Box. In fact, the documents expressly limit EPA's covenant not to sue to the Box. The language in the documents is consistent with the testimony of the EPA's negotiating attorney who indicated the Defendants consistently sought a binding commitment on the Basin and the EPA consistently rejected such broad relief. This Court has great respect for the attorneys who represented Hecla and Asarco during the negotiations, and if such a commitment had been reached, the Court is confident such commitment would have been drafted into the decree.

The Court does find, however, based on assurances given and consistent statements of intent made between 1991 and February of 1998, that actions outside the Box would be coordinated with the broader objectives of the Coeur d'Alene Basin Restoration Project ("CBRP") and regulatory tools other than remedial authority under CERCLA.[1] This finding is based on the repeated representations and references to the "multi-media approach" in letters, in the 1991 and 1992 Records of Decision (which it is undisputed are an enforceable part of the Consent Decree), in conversations with EPA management, in the CBRP Framework document and in Department of Justice pleadings to the Court in this case and in United States v. Asarco, et al., 96-122-N-EJL.

The Supreme Court rejected the argument that a decree can only be modified when a change in facts is both "unforeseen and unforeseeable." Rufo at 385. Since there was no legal commitment outside the Box, it was arguably "foreseeable" that the EPA might change their course of action. However, such was not anticipated based on the oral and written assurances given. For these reasons, the Court finds at the time the Consent Decree was entered, the Defendants did not anticipate the EPA using its remedial CERCLA authority to clean up the Basin.

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[1]The Court acknowledges the Defendants knew EPA might use some CERCLA authority other than "remedial authority" outside the Box. The Defendants' witnesses testified it was understood during negotiations that CERCLA clean up and removal authority for emergency and non-time critical sites in the Basin as well as action under the natural resources damages sections of CERCLA were possible remedies which would be used by the EPA.

Ms. Rasmussen, EPA Regional Administrator for Region 10, acknowledged that she had "apparent authority" to speak for EPA and that she would expect one to rely on statements made by her. She did not believe she made the statements attributed to her, but she also admitted she does not have a recollection of any meetings with the management of Hecla or Asarco or statements made. Mr. Brown, Chairman and President of Hecla, on the other hand, had a specific recollection of the meetings and statements made and the exhibits support his understanding. The credibility of his recollection is enhanced by the circumstances then existing and the significance of the same to the survival of the mining companies.

The Government's argument that the Regional Director could not legally bind the United States Government nor the state of Idaho is not relevant because the Consent Decree is not being held invalid nor does modification under Rule 60(b)5 require "actual authority."

The Court further finds that the statements and testimony of the United States and the state of Idaho's witnesses concerning the negotiations surrounding the matters to be included in the Consent Decree are credible and supported by the wording of the Consent Decree itself. That does not negate, however, the Court's ability to determine whether or not the trade offs within the Superfund site were made in light of the assurances given. Based on the testimony given, it is difficult for this Court to believe that reputable business men, accountable to financial institutions, as well as stockholders, would not foremost be concerned with how far their dollars would reach and what could be done to keep the company afloat.

The Court finds that all of the parties to the Consent Decree hoped the CBRP would be successful in cleaning up the Basin. Only after the Consent Decree was signed and approved by the Court and a few years had passed were the Defendants able to "anticipate" that the CBRP would not meet the goals of the EPA. Defendants were first put on notice of the change in circumstance as to

how cleanup of the Basin would be approached in early 1998 when the EPA publicly announced that it would be conducting an Remedial Investigation Feasibility Study (RI/FS) on the Basin.[2]

The Court clearly has continuing jurisdiction over the Consent Decree and the authority under the law (60(b)5) to modify a decree on such terms as are just. The Court concludes as a matter of law that Defendants have carried their burden in establishing there has been a significant change in factual circumstances and these changes were not reasonably anticipated by the Defendants at the time the Consent Decree was signed.

The next issue to resolve is whether the change in position by the EPA to conduct a Basin-wide RI/FS has made compliance with the decree "substantially more onerous." Plaintiffs argue the change has not made compliance more onerous as Defendants have continued to conduct the work and, in fact, waited for three years since the announcement on the Basin RI/FS to file their motion to modify the Consent Decree. Plaintiffs also argue the obligations under the Consent Decree for clean up of the Box have not increased based on the EPA's decision to exercise remedial CERCLA authority in the Basin. These arguments are correct factual statements, however, they ignore the financial reality of the EPA's decision to conduct a Basin-wide RI/FS.

Once the EPA's decision was made to conduct an RI/FS and such decision was announced publicly, the financial impact on both Hecla and Asarco was significant. No longer were their sources of credit or equity available to finance operations which fund payments under the Consent

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[2]EPA's policy is that it may revise NPL site boundaries at any time. The Ninth Circuit has held that EPA gave adequate notice of the expansion of the Superfund site boundaries from the Box to the Basin when the EPA filed the complaint in United States v. Asarco, et al., 96-122-N-EJL. United States v. Asarco Incorporated, 214 F.3d 1104 (9th Cir. 2000). The Ninth Circuit also ruled any challenge to the expanded boundaries would need to be filed in the United States Court of Appeals for the District of Columbia.. Id. at 1107. The Defendants filed a notice with the Court indicating they were not filing an appeal in the District of Columbia. See Docket No. 887 in United States v. Asarco, et al., 96-122-N-EJL.

Decree. Third parties questioned the companies regarding the potential liability to the companies for remedial clean up of the Basin. While the Plaintiffs argue it is speculative how much liability Hecla and Asarco will have under the RI/FS as PRPs, based on the damages and injuries presented to this Court by the United States in the natural resource damages action, significant potential liability is more probable than not. The only real speculation in this situation is what other companies, if any, remain in business (and that have not already settled) that could potentially share the financial burden of cleaning up the Basin under the RI/FS.[3] The certainty and finality bargained for dissipated and created a greater risk for investors. When financing could not be obtained the mining companies had to sell assets and this resulted in additional layoffs of workers.

Now instead of being financially committed to just the Box the Defendants are exposed to liability far beyond what was contemplated. Financial institutions have reacted accordingly. While Defendants acknowledge they faced liability outside the Box under the CBRP, such liability was understood to be somewhat more flexible, include cooperation from a number of agencies (both State and Federal) as well as private enterprise and provide for a time line that would encourage voluntary action.

The Plaintiffs arguments that the change in direction outside the Box does not make obligations inside the Box substantially more onerous is unpersuasive. However, the Court does not have the necessary facts before it to quantify how much more onerous compliance has become. While the Court is aware of the scope of the RI/FS being conducted based on testimony in United States v. Asarco, et al., 96-122-N-EJL, it is unclear to the Court how much increased liability

[3]Based on testimony in United States v. Asarco, et al., 96-122-N-EJL, the RI/FS is expected to be complete in December 2001.

Defendants Hecla and Asarco will face under the Basin RI/FS than they had under the "multi-media approach" to clean up of the Basin.

Based on this Court's familiarity with EPA's plans for the Basin, the Court believes the overall liability under the RI/FS for the area outside the Box will be substantial. The Court is putting the parties on notice that it believes it is highly likely the Defendants will be able to establish that compliance under the Consent Decree has become substantially more onerous. Then the Court will have to determine whether the Defendants' proposed modification is "suitably tailored to the changed circumstances." Rufo at 370-71. Absent the Basin RI/FS being finalized and a Record of Decision being issued, it is impossible for the Court to tailor an appropriate modification.

Defendants requested a modification equal to a reduction in their obligations in the amount of $14.5 million dollars plus a reduction in on-going monitoring costs.[4] The Plaintiffs indicated at the evidentiary hearing that this was the first time they had heard of the monetary request being sought by the motions to modify. The Court agrees with the Plaintiffs that they have had insufficient time to consider, prepare or present evidence on the appropriateness of the Defendants' requested modification.

In conclusion, the Court finds the changed circumstances were not anticipated and were not the result of fault by any party subsequent to the negotiation process. The "multi-media approach"to clean up the Basin was undertaken in 1991 and continued until late 1997 when it was determined by the EPA a different approach to clean up was necessary. Considering the totality of the

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[4]The $14.5 million represents the amount of monies either spent or expected to be spent on clean up of the Pinehurst area. Defendants argue they did not cause any of the harm in the Pinehurst area by their historical operations and this would be a fair reduction in their obligations under the Consent Decree based on the change in circumstances. Plaintiffs argue this would not be a fair modification as clean up of the Pinehurst area was a trade off in negotiations and Plaintiffs ended up with clean up responsibility in non-populated areas where the Defendants had historically operated.

circumstances surrounding the entry of the Consent Decree, the EPA's decision to proceed with a Basin RI/FS is a substantial change in circumstances. Exactly how onerous the Basin RI/FS will make compliance with the 1994 Consent Decree is unclear. However, enforcement of the Consent Decree without modification could be detrimental to the public interest because enforcement as contemplated is putting the mining industry out of business. While depressed metal prices might have put some of the mining companies out of business or in bankruptcy, Mr. Pfahl and Mr. Brown both testified that the demands being made under CERCLA, and not the market conditions, are bleeding the companies to death. If the parties are unable to agree upon a fair and just modification to the Consent Decree based on this Order, then the Court will conduct further hearings after the Record of Decision on the Basin RI/FS is issued and the Court will determine an appropriate remedy.[5]

Order

Being fully advised in the premises, the Court hereby orders that:

1) Plaintiffs Joint Motion in Limine (Docket No. 91) is DENIED.

2) Defendants Hecla and Asarco's Motions to Modify Consent Decree (Docket Nos. 55 and 56) are GRANTED IN PART AND DENIED IN PART consistent with this Order. The Court will conduct further hearings on this matter after the Record of Decision on the Basin RI/FS is completed. The Court orders the Defendants to continue to remediate the "high risk

[5]Plaintiffs argue this Court cannot award a judgment in favor of the Defendants as such is barred by the United States' sovereign immunity and the Eleventh Amendment. The Court has no intention of awarding a money judgment in favor of Defendants. Rather, the Court has the authority to modify the consent decree "upon such terms as are just" pursuant to Rule 60(b) and any reduction in the Defendants' obligations under the Consent Decree would not be barred by the Plaintiffs arguments.

yards" in the Box pending a determination of an appropriate modification to the Consent Decree.

ORDERED this 30th day of September, 2001.

EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

cv

United States District Court
for the
District of Idaho

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 3:94-cv-00206

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